Chapter 12

CANADIAN LABOUR TRENDS

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The Canadian Labour Trends session consisted of two presentations. First, National Academy of Arbitrators (NAA) member Pam Picher addressed the important issue of the scope of an arbitrator's remedial jurisdiction. Second, Professor Daphne Taras discussed the deliberations of the Arthurs' Commission that currently is reviewing the *Canada Labour Code*.

The Scope of Arbitral Remedies

In *In re Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union (Olivo)* (2000),[1] the union claimed the grievor, Mr. Olivo, a professor and lawyer who was also the vice-president of the academic bargaining unit, had been unjustly discharged on February 10, 1998. The employer alleged the grievor had sent the Director of Employee Relations, Mr. Fogel (who was a past president of the Academic bargaining unit), "written material that was anti-Semitic and disturbing" on four occasions. The only evidence linking the grievor to the materials was the fact that two of the documents received by Mr. Fogel had been delivered in re-usable, interdepartmental envelopes allegedly addressed to Mr. Fogel in the grievor's handwriting. By way of remedy, the union requested reinstatement with full redress and "compensation in damages for defamation, loss of dignity and injury to personal feelings." In the original award of May 25, 2000, the board of arbitration unanimously voided the discharge and reinstated the grievor with full redress.

By agreement of the parties, the board retained jurisdiction to make a decision with respect to the implementation of the award, including the union's claim for $5,000 in aggravated damages for "mental distress" and punitive damages in the amount of $5,000

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[1]61 C.L.A.S. 217 (P.C. Picher).

on the claim that the employer's decision was motivated by "bad faith, malice and anti-union animus." Ultimately, the board of arbitration reconvened to deal with the remedial matters. The union relied on *In re Weber v. Ontario Hydro* (1995),[2] in support of its position that the board of arbitration has the jurisdiction to award aggravated and punitive damages.

In *Weber*, the grievor was a member of a bargaining unit who had been disciplined on the grounds of abuse of sick-leave benefits. In addition to filing a grievance, Mr. Weber commenced a court action against his employer grounded in tort alleging, among other things, "trespass, nuisance, deceit, and invasion" in regard to the employer's use of private investigators who entered his home under pretense in response to the employer's suspicions about Weber's sick leave benefits claim.

In addressing the grievor's tort action in the context of the issue of jurisdiction between labour arbitration and the civil courts, the Supreme Court in *Weber* rejected the "concurrent model" and the "model of overlapping jurisdiction," and adopted the "exclusive jurisdiction model." As to the test of exclusive jurisdiction, the Court states, "On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceeding centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the *dispute* and the *ambit of the collective agreement*."[3] As to what constitutes a "dispute," the Court states, "If the dispute, regardless of how it may be characterized legally, arises under the collective agreement, arbitration is the dispute resolution mechanism. [The task is to] determine whether the dispute, in its essential character, arises from the interpretation, application, administration or alleged violation of the collective agreement."[4] As to the "ambit of the collective agreement": "Only disputes which *expressly* or *inferentially* arise out of the collective agreement are foreclosed to the courts."[5]

The Supreme Court also addressed the matter of remedies in the context of an arbitrator's exclusive jurisdiction as follows: "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent juris-

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[2]125 D.L.R. (4th) 583, [1995], 2 S.C.R. 929.
[3]*Id.* at para. 51 (emphasis added).
[4]*Id.* at para. 52.
[5]*Id.* at para. 54 (emphasis added).

diction in each province may take jurisdiction."[6] In this regard, the Court went on to explain, ". . . the exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal."[7]

In a supplementary award of December 4, 2001, the majority of the *Seneca College* board of arbitration rejected the union's argument based on *Weber*, stating:

> Indeed the decision in *Weber* expressly confirms that the ability to deal with what might otherwise be a tort must flow from the collective agreement. In that case, the Court placed particular weight on the fact that the employees under the collective agreement had an express right to grieve "unjust treatment," a protection that the Court interpreted as extending to surveillance and the invasion of privacy. In its essence, *Weber* confirms that if a board of arbitration is to exercise jurisdiction to award damages for tortious wrongdoing, its authority to do so must arise from the collective agreement.
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> We have been directed to nothing in the instant collective agreement that would ground such extraordinary jurisdiction. Moreover, if, as the dissent suggests, a court might decide to not entertain an action by [the grievor] in tort against Mr. Fogel or the College merely because a collective agreement was in place, the court would plainly fail to understand and properly apply the decision of the Supreme Court in *Weber*.

The union sought review of this decision.

In its November 1, 2004, decision,[8] the Ontario Divisional Court determined, first, that the appropriate standard of review of the award was that of "correctness" and not "patently unreasonable" or "reasonableness *simpliciter*," ". . . because the board of arbitration was deciding upon its jurisdiction, the appropriate standard of review of the decision is that of correctness."[9] In addressing the issue of whether or not the dispute was within the ambit of the collective agreement, the Divisional Court found, as follows:

> The essential character of the dispute before the Board of Arbitration was an unjust dismissal and the appropriate remedy therefor. In my view, the issue of aggravated and/or punitive damages is a dispute between the parties *arising either directly or inferentially from the Collective Agreement* and, therefore, within the exclusive jurisdiction of the Board

[6] *Id.* at para. 57.
[7] *Id.* at para. 67.
[8] File no. 385/02.
[9] *Id.* at para. 18.

> of Arbitration. It is well established that labour arbitrators have broad remedial power, including the power to award damages.[10]

The Divisional Court found that the board of arbitration "erred when it declined jurisdiction to address the issue of aggravated and/or punitive damages."[11] Leave to appeal the Divisional Court decision has been granted.

The *Seneca College* case is important for a number of reasons. Of direct significance is that the Divisional Court seems to suggest that whatever remedy is requested, the exclusive jurisdiction model identified by the Supreme Court in *Weber* requires an arbitrator to deal with the matter, notwithstanding the hesitation expressed by the Supreme Court in that case specifically in regard to the reach of an arbitrator in the matter of remedy. Further, should the decision be upheld by the Ontario Court of Appeal, and remain unchallenged, labour-management arbitrators may be required to deal with such civil court matters as defamation, slander, or libel. However, the civil courts traditionally have been viewed as possessing greater expertise to deal with these matters than arbitrators who, in any event, are chary of the notion that tort matters arise inferentially from a collective agreement.

Review of the Canada Labour Code

In the second presentation, Dr. Daphne Taras, Professor of Industrial Relations at the University of Calgary, discussed her involvement as a member of Professor Harry Arthurs' Commission, charged with the responsibility of reviewing and recommending changes to the *Canada Labour Code*. The Arthurs' Commission has been given broad parameters of review.

Among other areas of inquiry, Professor Taras reported that the Commission is examining the Code in terms of its effect on home life/work life issues. This examination includes looking at the definition of "work," and how employment standards might be changed in order to better reflect current societal norms.

Of particular interest to arbitrators, Professor Taras indicated that adjudication of unjust dismissal complaints by non-unionized, nonmanagerial employees in federally regulated sectors has drawn Professor Arthurs' attention. The most recent annual data indicate some 1,200 such complaints, of which 324 proceeded to

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[10] *Id.* at para. 26 (emphasis added).
[11] *Id.* at para. 33.

adjudication. Although the sectoral and geographic dimensions of the number of unjust dismissal complaints is of interest to the Commission, of more significance is anecdotal information it has received concerning the quality of some federally appointed adjudicators. Professor Taras indicated, in effect, that some appointees (other than NAA arbitrators and other experienced adjudicators) may not have the appropriate level of knowledge, experience, or skill to ensure that the adjudicative procedure is properly conducted. She indicated that Region VII might consider assisting the Arthurs' Commission by way of a submission that addresses due process and natural justice matters. At the Region VII Annual Meeting, a committee was struck for that purpose.